Supreme Court, U.S.

No. 09-548 2009

In The OFFICE OF THE CLERK

Supreme Court of The United States

JUDY WOOD, on behalf of the
United States of America,

Petitioner,

v.

APPLIED RESEARCH ASSOCIATES, INC., SCIENCE APPLICATIONS INTERNATIONAL CORP., COMPUTER AIDED ENGINEERING ASSOCIATES, INC., DATASOURCE, INC., GEOSTAATS, INC., GILSANZ MURRAY STEFICEK LLP, HUGHES ASSOCIATES, INC., AJMAI ABBASI, EDUARDO KAUSEL, DAVID PARKS, DAVID SHARP, DANIELE VENEZANO, JOSEPH VAN DYCK, KASPAR WILLIAM, ROLF JENSEN & ASSOCIATES, INC., ROSENWASSER/GROSSMAN CONSULTING ENGINEERS, P.C., SIMPSON GUMPERTZ & HEGER, INC., S.K. GHOSH ASSOCIATES, INC., SKIDMORE OWINGS & MERRILL, LLP, TENG & ASSOCIATES, INC., UNDERWRITERS LABORATORIES, INC., WISS, JANNEY, ELSTNER ASSOCIATES, INC. and UNITED AIRLINES,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION

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QUESTIONS PRESENTED

In a Summary Order issued on July 13, 2009, and amended on July 16, 2009, (Appendix A) the Second Circuit affirmed the district court's judgment and decision of June 26, 2008, (Appendix B) dismissing Dr. Judy Wood's (Dr. Wood or petitioner) qui tam suit under the False Claims Act ("FCA"), 31 U.S.C. § 3729 et seq. Dr. Wood brought her FCA claims against Applied Research Associates, Inc., et al. (the "Contractor Defendants" or respondents), who provided services to the government in connection with the National Institute of Standards and Technology's (NIST) investigation of the collapses of the Twin Towers of the World Trade Center. The district court dismissed Dr. Wood's claims for (1) want of subject matter jurisdiction under 31 U.S.C. § 3730(e)(4)(A) and (2) failure to state a claim under Fed. R. Civ. P 12(b)(6) and plead fraud with particularity under Fed.R.Civ.P.9(b). The Second Circuit determined that Dr. Wood's claims fell short of the pleading standard required by Fed.R.Civ.P.9(b) and that the district court did not abuse its discretion in denying Wood leave to amend the Amended Complaint. But, the Second Circuit declined to reach the question of whether the district court had subject matter jurisdiction under 31 U.S.C. § 3730(e)(4)(A).

During the pendency of Dr. Wood's appeal, the FCA was *retroactively* amended in a manner that has a direct bearing upon the pleading standard required by Fed.R.Civ.P.9(b) by virtue of a change in the FCA that is intended to clarify the FCA so as to make it easier for qui tam relators to survive motions to dismiss and for such cases to be allowed

to proceed to discovery, something that was denied in this case and which is routinely denied in qui tam cases. In addition, while the Second Circuit acknowledged on the one hand that the FCA had been retroactively amended[1], that court specifically declined to apply or otherwise engage in analysis of the retroactive amendment, on the other. In the absence of analysis of the retroactive change in the FCA, it is not possible for the Second Circuit to have reasonably concluded that district court did not abuse its discretion in denying Wood leave to amend the Amended Complaint. Indeed, the retroactive change in the FCA applies to *all* cases pending as of June 7, 2008, which includes, of course, this case.

The Congress acted to amend the FCA, retroactively in some respects, precisely in order to preclude the outcome handed down by the Second Circuit in this case. The Second Circuit acknowledged in its Summary Order that the Fraud Enforcement and Recovery Act, (FERA) Pub.L. No.111-21, 123 Stat. 1621 (2009) contained retroactive changes, but then held that the modifications did not change the analysis engaged in by the Second Circuit. The Second Circuit did not indicate which of the retroactive provisions of FERA it had reference to, let alone any rational for not applying the provisions that are retroactive. Thus far, the circuits have either side-stepped the issue of FERA's retroactivity and/or have denied that it has retroactive effect. In particular, the retroactive language that has not been either properly or consistently interpreted between and among the circuits is: "...(1) subparagraph (B) of *section 3729(a)(1) of title 31, United States Code* , as added

[1] See Footnote 2 of the Second Circuit's July 16, 2009 Summary Order, Appendix A pg.18

by subsection (a)(1), shall take effect as if enacted on June 7, 2008, and apply to all claims under the False Claims Act (*31 U.S.C. 3729* et seq.) that are pending on or after that date..." This language is particularly apt in connection with the Second Circuit's upholding of the district court having declined to allow an amendment to the complaint. As FERA specifically made a statutory change applicable to cases pending as of June 7, 2008, as was this case, it follows that an amendment of the complaint must be permitted, as, in effect, that is what the law provides. Clear and direct conflict amongst the circuits exists in connection with FERA.

No circuit court has, as yet, engaged in a proper analysis of either FERA or of its retroactive provisions.

Two questions are presented:

1. Does that part of the FCA modified by FERA that is applicable to all cases pending as of June 7, 2008, mandate that all such complaints may be amended so as to conform to the mandate of the retroactively changed statute and/or to conform to the Congressional overturning of the decisions handed down in Allison Engine Co. v. United States ex rel. Sanders, 128 S. Ct. 2123 (2008), and United States ex. rel. Totten v. Bombardier Corp, 380 F.3d 488 (D.C. Cir. 2004)?

2. Does the change, in relevant part, of what had been codified as 31 U.S.C. § 3729(a)(2) -- from, "...knowingly ma[de], use[d], or cause[d] to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government." -- to what is now codified as 31

U.S.C. § 3729(a)(1)(B) and stating: "knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim" -- prevent dismissal of FCA cases pending as of June 7, 2008, without an opportunity to amend complaints that were based upon the pre-FERA statutory language?

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Appendix B – Memorandum Decision And Order of The United States District Court For The Southern District Of New York Dated and Filed June 26, 2008

OPINION BELOW

A Summary Order was issued by the U.S. Court of Appeals for the Second Circuit on July 13, 2009 and is reported at 2009 U.S. App. LEXIS 15402. An Amended Summary Order was issued on July 16, 2009. The Second Circuit affirmed the June 26, 2008 decision of the United States District Court for the Southern District of New York, reported at 2008 U.S. Dist. LEXIS 48761. See Appendices A-B

STATEMENT OF JURISDICTION

This court's jurisdiction is invoked per 28 U.S.C. § 1254(1).

The Second Circuit's opinion and Summary Order was rendered on July 13, 2009 and amended on July 16, 2009. See appendix A.

The statutory provision believed to confer on this court jurisdiction to review on a writ of certiorari the summary order of the Second Circuit here appealed from is Sec. 4.of the Fraud Enforcement and Recovery Act, (FERA) Pub. L.No.111-21, 123 Stat. 1621 (2009) at (a)(1)(B) and at (f)(1).

STATUTES INVOLVED

Title 31 United States Code, Section 3729(a)(1)(B), as amended by the Fraud Enforcement and Recovery Act, (FERA) Pub. L.No.111-21, 123 Stat. 1621 (2009)

§ 3729. False claims

(a) Liability for certain acts.

(1) In general. Subject to paragraph (2), any person who--

(A) knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval;

(B) knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim;

Title 31 United States Code, Section 3729(a)(2) [pre-FERA]

"...knowingly ma[de], use[d], or cause[d] to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government.

Fraud Enforcement and Recovery Act, (FERA) Pub. L.No.111-21, 123 Stat. 1621 (2009)

Sec. 4. CLARIFICATIONS TO THE FALSE CLAIMS ACT TO REFLECT THE ORIGINAL INTENT OF THE LAW.

(a) Clarification of the False Claims Act.-- *Section 3729 of title 31, United States Code*, is amended--

(1) by striking subsection (a) and inserting the following:

"(a) Liability for Certain Acts.--

"(1) In general.-- Subject to paragraph (2), any person who--

"(A) knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval;

"(B) Knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim;

...

(f) Effective Date and Application.--The amendments made by this section shall take effect on the date of enactment of this Act and shall apply to conduct on or after the date of enactment, except that--

(1) subparagraph (B) of *section 3729(a)(1) of title 31, United States Code* , as added by subsection (a)(1), shall take effect as if enacted on June 7, 2008, and apply to all claims under the False Claims Act (*31 U.S.C. 3729* et seq.) that are pending on or after that date; and

(2) section 3731(b) of title 31, as amended by subsection (b); section 3733, of title 31, as amended by subsection (c); and section 3732 of title 31, as amended by subsection (c); shall apply to cases pending on the date of enactment.

STATEMENT OF THE CASE

Dr. Wood's claim of fraud consisted in a challenge to the work performed and to the

payments received by a group of contractors, of which Applied Research Associates Inc. is the first named of them, arising in connection with the investigation of what caused the destruction of the Twin Towers of the World Trade Center on September 11, 2001. The work and the payments were pursuant to a Congressional mandate[2] that the National Institute of Standards and Technology (NIST) make a determination, among other things, as to why and how the Twin Towers of the World Trade Center were destroyed on September 11, 2001.

NIST contracted out much of the scientific and technical work to be done to determine why and how the Twin Towers of the World Trade Center collapsed, or were destroyed, to a group of contractors who, by and large, are contractors in the area of weapons procurement and development and are, therefore, members of what is commonly referred to as the "military-industrial-complex."

Those who performed work and received payment from NIST are alleged to have engaged in scientific fraud by petitioner, Dr. Wood, a materials engineering scientist, based upon a process of fraud documented by Dr. Wood's original source research and findings that concluded that the Twin Towers of the World Trade Center were destroyed by an unconventional energy weapon that can be direct and thus is referred to as a form of what are called "directed energy weapons" (DEW). Moreover, ARA and some of the other respondents are manufacturers, developers and/or testers of the

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[2] The National Construction Safety Team Act, 15 U.S.C. § 1703 et seq. (the Act), "gives NIST comprehensive authority to complete the investigation of the WTC disaster." See also, 15 U.S.C. § 7311.

lethality effects of precisely that kind of weaponry; namely, DEW.

As such, they knew or should have that the work they performed for NIST not only did not disclose why and how the Twin Towers were destroyed, but which went further and purposefully acquiesced in a willfully fraudulent curtailment of the scope of the investigation to a point in time that did not even address the actual phase or time frame of the destruction of the Twin Towers. That is scientific fraud and/or willful blindness to it.

REASONS FOR ALLOWANCE OF THE WRIT

The treatment of this case in the courts below was blatantly misdirected in that it was assumed that the case had, as its purpose, that of making allegations concerning who destroyed the Twin Towers. As such, the case was characterized derisively as "a conspiracy theory" even though the evidence it relied on and the claims it made were clearly of a scientific nature of very high quality. That characterization of the case as a "conspiracy theory" was false and misleading; and, more importantly, appears to have resulted in cursory treatment, exemplified in, among other ways, the Second Circuit's refusal to apply FERA to it.

This is a case that centers on the fraud associated with determining what caused the destruction of the Twin Towers, not the identity of the perpetrators. The point is, Dr. Wood has demonstrated that the Twin Towers were destroyed by DEW and that the respondents herein knew or should have that that is the case and they therefore engaged in actionable fraud within the meaning of the FCA.

The FCA was retroactively modified and amended during the course of the proceedings within the Second Circuit. In upholding the lower court's dismissal of Dr. Wood's qui tam case, the court of appeals merely acknowledged the existence of the retroactive changes in the FCA but did not apply those changes to its consideration of Dr. Wood's appeal. The salient portion of the Second Circuit's consideration of the new law, FERA, can be found at footnote 2 of the July 13, 2009, Summary Order and states:

> In 2009, after Wood's complaint was filed, the various causes of action in 31 U.S.C. § 3729 were reorganized and restated. *See* Fraud Enforcement and Recovery Act, Pub. L. no. 111-21, 123 Stat. 1621 (2009). While some of these changes are retroactive, they do not change the analysis herein. For ease of presentation, we reference the previous version of 31 U.S.C. § 3729, on which the parties' briefing is predicated.[3]

I. REVIEW IS WARRANTED TO RESOLVE A CONFLICT CONCERNING THE RETROACTIVE APPLICATION OF FERA.

A. Congressional overturning of Allison Engine Co. v. United States ex rel. Sanders, 128 S. Ct. 2123

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[3] While the parties briefing may have reference the older version of 31 U.S.C. § 3729 et seq., the petitioner herein brought the new law to the Second Circuit's attention in a pre-oral argument motion.

(2008), and United States ex. rel. Totten v. Bombardier Corp, 380 F.3d 488 (D.C. Cir. 2004)

The enactment of a retroactive statutory change during the pendency of an appeal of a case that was and is based on the retroactively changed statute is not an everyday occurrence. However, that is what has happened in and with respect to this case. Despite that fact, the Second Circuit specifically chose to leave all issues relative to that change unresolved by choosing not to engage in an analysis of it, other than to acknowledge the retroactivity of the change. Here, the Second Circuit, by its own statement, did not consider the retroactive change.

FERA amends the FCA to clarify and correct interpretations of the law that were said, by Congress, to have been erroneous. The erroneous interpretations were said to be contained in Allison Engine Co. v. United States ex rel. Sanders, 128 S. Ct. 2123 (2008), and United States ex. rel. Totten v. Bombardier Corp, 380 F.3d 488 (D.C. Cir. 2004). In Allison Engine, the Supreme Court held that Section 3729(a)(2) of the FCA requires the Government to prove that "a defendant must intend that the Government itself pay the claim," for there to be a violation. 128 S.Ct. at 2128. As a result, even when a subcontractor in a large Government contract knowingly submits a false claim to general contractor and gets paid with Government funds, there can be no liability unless the subcontractor intended to defraud the Federal Government, not just their general contractor. This is contrary to Congress's original intent in passing the law and creates a new element in a FCA claim and a new

defense for any subcontractor that are inconsistent with the purpose and language of the statute.

Similarly, in Totten, the Court of Appeals for the District of Columbia Circuit held that liability under the FCA can only attach if the claim is "presented to an officer or employee of the Government before liability can attach." 380 F. 3d at 490. Known as the "presentment clause," the D.C. Circuit interpreted this clause to limit recovery for frauds committed by a Government contractor when the funds are expended by a Government grantee, such as Amtrak. The Totten decision, like the Allison Engine decision, runs contrary to the clear language and congressional intent of the FCA by exempting subcontractors who knowingly submit false claims to general contractors and are paid with Government funds.

Among other unresolved conflicts that have arisen post-FERA is that the circuits continue to cite, with approval, this court's decision in Allison Engine irrespective of the amending the language of 31 U.S.C. § 3729(a)(2) that replaces the words "to get" with the word "material." *See* S. Rep. No. 111-10 (2009). Thus, under the new version, that, as noted in this petition, is recodified as 31 U.S.C. § 3729(a)(1)(B), a person is liable under the FCA if he "knowingly makes, uses or causes to be made or used, a false record or statement material to a false or fraudulent claim."

123 Stat. at 1621. Section 4(f) of **FERA** also provides that [T]he amendments made by this section shall take effect on the date of enactment of this Act and shall apply to conduct on or after the date of enactment, except that

(1) subparagraph (B) of section 3729(a)(1) of title 31, United States Code, as added by subsection (a)(1), shall take effect as if enacted on June 7, 2008, and apply to all claims under the False Claims Act (31 U.S.C. 3729 et seq.) that are pending on or after that date; and

(2) section 3731(b) of title 31, as amended by subsection (b); section 3733, of title 31, as amended by subsection (c); and section 3732 of title 31, as amended by subsection (e); shall apply to cases pending on the date of enactment.

The changes are significant and the ones referenced as having retroactive effect so as to apply to all cases pending as of June 7, 2008, need to be analyzed and interpreted by this court so that the circuits and the lower courts may have guidance upon this important issue.

II. REVIEW IS NECESSARY TO RESOLVE CONFLICTS ARISING IN THE CIRCUITS CONCERNING THE EFFECT OF THE RETROACTIVE PROVISIONS OF FERA UPON FCA CASES PENDING AS OF JUNE 7, 2008.

A. AUTOMATIC RETROACTIVITY OF FERA

The universe of qui tam cases pending as of June 7, 2008, and therefore subject to the retroactivity provision of FERA, is not infinite, but it is significant enough to warrant a clarifying interpretation to be handed down by this court.

Another factor relevant here is that the legislative history of FERA made it clear that Congress disapproves of the way in which many courts, including the Second Circuit in the within case, have overly strictly applied F.R.Civ.P Rule 9(b) to FCA lawsuits. See 111 Congress 1st Session, S 386 2009.[4] Among the circuits that have either ignored the retroactivity provisions of FERA or have applied them differently and inconsistently with either the Second Circuit or in disregard of the overturning of the interpretation in Allison Engine, is United States v. Saybolt, 577 F.3d 195, (3d Cir. 2009.

The actual change in 31 U.S.C. § 3729(a)(1)(B) can obviously change the way in which claims of fraud are "particularized" for a variety of reasons, not least of which is that the requirement of what must be specified is made easier by virtue of that change. In any event, a litigant who had a case pending as of June 7, 2008, is not mandated by Congress to seek to have the retroactive changes made applicable. Instead, the law says clearly and unequivocally that the change applies to such cases. At a minimum, then, the courts are mandated, by law, to consider all such cases based on that retroactive change.

B. LEAVE TO AMEND COMPLAINT

In order to obtain the retroactive benefit of FERA, it follows that litigants must be afforded the opportunity to amend complaints so as to plead the different and the more lenient language of FERA

[4] Reference to that legislative history was submitted to the Second Circuit in a pre oral argument motion.

prior to having their cases dismissed on the basis of failure to plead with particularity under F.R.Civ.P Rule 9(b) because the particularity requirements associated with the modified language of 31 U.S.C. § 3729(a)(1)(B), as it now reads, is factually, or at least arguably, easier. Any other construction here would deny the benefit of the retroactive change in the law.

It is also noted that Congress has, in any event, criticized the strict application of F.R.Civ.P rule 9(b) to FCA cases which provides all the more reason why review and clarification is needed.

CONCLUSION

For all of the foregoing reasons, petitioner, Dr. Wood, respectfully requests that the Supreme Court grant review of this matter.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

AMENDED SUMMARY ORDER

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 16th day of July, two thousand nine.

PRESENT:
ROGER J. MINER,
DEBRA ANN LIVINGSTON,
Circuit Judges,
DAVID G. TRAGER;*
District Judge.

JUDY WOOD, on behalf of the
UNITED STATES of AMERICA,

Plaintiff-Appellant,

No. 08-3799-cv

- v -

APPLIED RESEARCH ASSOCIATES, Inc., SCIENCE APPLICATIONS INTERNATIONAL CORP., COMPUTER AIDED ENGINEERING ASSOCIATES, Inc., DATASOURCE, Inc., GEOSTAATS, Inc., GILSANZ MURRAY STEFICEK, LLP, HUGHES ASSOCIATES, Inc.,

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Defendants-Appellees.

BOEING, NUSTATS, AMERICAN AIRLINES and SILVERSTEIN PROPERTIES,

Defendants.

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Patricia B. Gary (David T. Hatem, *of counsel*), Donovan Hatem LLP, Boston, MA; Gail D Zirkelbach, Jackson Kelly PLLC, Denver, CO, *for Defendants-Appellees.*

UPON DUE CONSIDERATION, it is hereby ORDERED, ADJUDGED, AND DECREED that the judgment of the District Court for the Southern District of New York is AFFIRMED.

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*The Honorable David G. Trager, of the District Court for the Eastern District of New York, sitting by designation.

Plaintiff-Appellant Dr. Judy Wood ("Wood") appeals from the June 26, 2008 decision of the District Court for the Sorthern District of New York (Daniels, J.), dismissing Wood's *qui tam* suit under the False Claims Act ("FCA"), 31 U.S.C. § 3729 *et seq*. Wood brings her FCA claims against Defendants-Appellees Applied Research Associates, Inc., et al. (the "Contractor Defendants"), various entities which provided services to the government in connection with the National Institute of Standards and Technology's investigation of the collapse of the World Trade Center. The district court dismissed Wood's claims for (1) want of subject matter jurisdiction under 31 U.S.C. § 3730(e)(4)(A), and (2) failure to state a claim under Fed. R. Civ. P. 12(b)(6) and plead fraud with particularity under Fed. R. Civ. P. 9(b). *See Wood ex rel. United States v. Applied Research Assocs., Inc.*, No. 07-cv-3314, 2008 WL 2566728, at *3 (S.D.N.Y. June 26, 2008). On appeal, Wood challenges both grounds for dismissal. We assume the parties' familiarity with the underlying facts, procedural history, and the issues presented for review.

"So long as we are satisfied that we have Article III jurisdiction, we have discretion to decline to resolve difficult jurisdictional questions." *Official Comm. of Unsecured Creditors of WorldCom, Inc. v. S.E.C.*, 467 F.3d 73, 81 (2d Cir. 2006). In such a case, we may dispose of a case on the merits while assuming "hypothetical jurisdiction." *See*, e.g., *Conyers v. Rossides*, 558 F.3d 137, 150 (2d Cir. 2009) ("[M]indful that the question is one of statutory rather than constitutional jurisdiction, we assume hypothetical jurisdiction over these claims,

and we proceed to address the alternative argument for dismissal offered below, namely, that judgment on the pleadings is appropriate as to Conyers's constitutional claims."); *Guaylupo-Moya v. Gonzales*, 423 F.3d 121, 132 n.10 (2d Cir. 2005) ("Because the exhaustion requirement raises a question of statutory, rather than constitutional, jurisdiction, we need not resolve [it] in this case and can dispose of [the petitioner's] argument on its merits."). Because we agree that Wood's claims fall short of the pleading standard required by Fed. R. Civ. P. 9(b), and furthermore, find that the district court did not abuse its discretion in denying Wood leave to amend the Amended Complaint, we decline to reach the question of whether the district court had subject matter jurisdiction under 31 U.S.C. § 3730(e)(4)(A).

I. Pleading Standards

The Supreme Court has recently articulated the standard applicable to the Contractor Defendants' motions to dismiss:

> To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a probability requirement,

> but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief.

Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009) (internal citations and quotation marks omitted). The "two working principles" underlying this standard are: (1) "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions"; and (2) "only a complaint that states a plausible claim for relief survives a motion to dismiss," and "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged but it has not show[n] ' — 'that the pleader is entitled to relief." *Id.* at 1949-50 (quoting Fed. R. Civ. P. 8(a)(2)).

Because "[i]t is self-evident that the FCA is an anti-fraud statute" and therefore "claims brought under the FCA fall within the express scope of Rule 9(b)," *Gold v. Morrison-Knudsen Co.*, 68 F.3d 1475, 1476-77 (2d Cir. 1995), Wood's Amended Complaint must also meet the heightened pleading standard of Fed R. Civ. P. 9(b). Rule 9(b) requires that "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." To satisfy the pleading requirements of Rule 9(b), a complaint must "(1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4)

explain why the statements were fraudulent." *Shields v. Citytrust Bancorp, Inc.*, 25 F.3d 1124, 1128 (2d Cir. 1994). As we have explained:

> The purpose of Rule 9(b) is threefold -it is designed to provide a defendant with fair notice of a plaintiff's claim, to safeguard a defendant's reputation from improvident charges of wrongdoing, and to protect a defendant against the institution of a strike suit. Thus, although Rule 9(b) permits knowledge to be averred generally, we have repeatedly required plaintiffs to plead the factual basis which gives rise to a strong inference of fraudulent intent. Essentially, while Rule 9(b) permits scienter to be demonstrated by inference, this must not be mistaken for license to base claims of fraud on speculation and conclusory allegations. An ample factual basis must be supplied to support the charges.

O'Brien v. Nat'l Prop. Analysts Partners, 936 F.2d 674, 676 (2d Cir. 1991) (internal citations omitted). "One of the [further] purposes of Rule 9(b) is to discourage the filing of complaints as a pretext for discovery of unknown wrongs. [A relator's] contention, that discovery will unearth information tending to prove his contention of fraud, is precisely what Rule 9(b) attempts to discourage." *Madonna v.*

United States, 878 F.2d 62, 66 (2d Cir. 1989) (internal citation and quotation marks omitted)[1]

Wood asserts that the Contractor Defendants presented false claims to the United States, and used false records or statements that were material to such claims, as well as financial obligations owed by the Contractor Defendants to the United States, in violation of 31 U.S.C. § 3729. Amended Complaint, 62-70. We have summarized the pertinent provisions of the FCA as follows:

> Under the FCA, the United States, or private citizens acting on its behalf, may sue to recover monies paid to a person who, among other things: "(1) knowingly presents, or causes to be

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[1] Wood seeks a relaxed pleading standard. She points out that "[d]espite the generally rigid requirement that fraud be pleaded with particularity, allegations may be based on information and belief when facts are peculiarly within the opposing party's knowledge," *Wexner v. First Manhattan Co.*, 902 F.2d 169, 172 (1990), and then urges that this "is a main factor here and should be dispositive of the issue of particularity." Plaintiff's Br. 43. But Wexner also makes clear that "[t]his exception to the general rule must not be mistaken for license to base claims of fraud on speculation and conclusory allegations. Where pleading is permitted on information and belief, a complaint must adduce specific facts supporting a strong inference of fraud or it will not satisfy even a relaxed pleading standard." Id. In any event, Wood does not assert any facts that are "peculiarly within the knowledge" of the Contractor Defendants other than those in the NCSTAR I report, which Wood concedes can be accessed online. Plaintiffs Br. 39 n.12.

> presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval; (2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government; ... or (7) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government." 31 U.S.C. § 3729.

United States ex rel. Lissack v. Sakura Global Capital Markets, Inc., 377 F.3d 145, 152 (2d Cir.2004) (ellipsis in original).[2]

At the outset, as the district court correctly observed, the Amended Complaint makes no mention of any financial obligation that the Contractor Defendants owed to the government, and moreover, does not specifically reference any

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[2] In 2009, after Wood's complaint was filed, the various causes of action in 31 U.S.C. § 3729 were reorganized and restated. *See* Fraud Enforcement and Recovery Act, Pub. L. No. 111-21, 123 Stat. 1621 (2009). While some of these changes are retroactive, they do not change the analysis herein. For ease of presentation, we reference the previous version of 31 U.S.C. § 3729, on which the parties' briefing is predicated.

false records or statements used to decrease such an obligation. Thus, Wood's "reverse false claims" action, which is premised on "FCA liability for false statements designed to conceal, reduce, or avoid an obligation to pay money or property to the Government," *id.*, was appropriately dismissed under Fed. R. Civ. P. 9(b).

As for Wood's other claims, i.e., that the Contractor Defendants supplied false claims for payment from the United States, as well as false statements and records material to such claims, the Amended Complaint fails "to specify the time, place, speaker, and ... even the content of the alleged misrepresentations." *Luce v. Edelstein*, 802 F.2d 49, 54 (2d Cir. 1986). In short, it "lacks the 'particulars' required by Rule 9(b)." *Id.*

Wood generally avers as follows:

> These claims are based upon defendants' false claims and false statements made in and pursuant to certain reports, meetings, decision-making procedures, documentation and analysis of various types ... for which defendants received significant monetary compensation, all the while having . . . knowledge . . . that all such documentation was either false, fraudulent, a sham and/or designed to obfuscate the true and correct state of affairs ... [T]he National Institute of Standards and Technology [was] mislead by the defendants' fraudulent acts and/or omissions . ... Instead [of providing consulting and other services

that would have enabled NIST to carry out its statutory mandate, defendants knowingly concealed, or failed to disclose, or caused others to fail to disclose material information in several reports filed in the public domain along with NCSTAR 1 . . . all of which purported to satisfy, but intentionally did not satisfy, the mandate that NIST had . . . . Instead, all such documentation serves soley to mislead, obfuscate and provide a vehicle for the intended fraud; namely, that of steering NIST away from a consideration of what caused the destruction of WTC 1,2; which, as elsewhere elaborated upon, was the use on 9/11/01 of exotic weaponry known as directed energy weapons.
. . . [D] efendants ... committed fraud in seeking to have NCSTAR 1 deceive the public into not recognizing that WTC1,2 could not reasonably or possibly have been destroyed in the manner seen absent the use of [directed energy weapons]. Some of the defendants knew as much; other defendants ... should have known.

As a result of defendants' false statements and false or fraudulent reports and other submissions issued or delivered to NIST during the course of NIST's investigation in the years of 2002 to 2005, defendants wrongfully

> obtained payments from NIST which they knew or should have known they were not entitled to receive, by virtue of the fraud they were then and there committing.

Amended Complaint, ¶112, 5, 13-14. This is drawn from the introductory "Nature of the Action" section of the Amended Complaint, and yet this is *the most detailed* section of the Amended Complaint. Indeed, nothing in the rest of the Amended Complaint sets forth with additional particularity the false claims or statements at issue, or "the circumstances constituting fraud." Fed. R. Civ. P. 9(b).

Instead, the Amended Complaint goes on to briefly describe each of the Contractor Defendants, either with no specific allegations as to a given defendant's involvement, *see*, e.g., Amended Complaint, ¶¶ 23, 25, 26-27, or with vague or generalized allegations as to a given defendant's involvement, *see*, e.g., *id*. ¶¶ 24 ("Between ARA and SAIC, some twenty-five (25) persons were assigned to work on, by literally surrounding and, accordingly, controlling and manipulating, NIST officials such that fraud . . . did . . . occur."); *id*. ¶29 ("That expertise [of Defendant GeoStats, Inc.] was used to perpetrate fraud in the preparation of NCSTAR 1."); id. ¶ 30 ("That expertise [of Defendant Gilsanz Murry Steficek, LLP] could have been, but was not, used for purposes of calling attention to the fact that the effects seen and left by the pattern of destruction of WTC 1,2 was caused by [directed energy weapons]. Instead, defendant chose to use its expertise to commit fraud based on either withholding information or manipulating

information and by then accepting payment improperly."); *id.* ¶¶ 31-41, 43 (containing nearly identical generalized allegations for other Contractor Defendants). Finally, the Amended Complaint conclusorily recites the elements of a cause of action under the FCA, see Amended Complaint, ¶¶62-70, and resorts to further collective generalizations about the Contractor Defendants, *see, e.g.*, ¶ 52 ("That modification [of the scope of NIST' s objective] was at the behest and with the urging, backing and/or combined manipulative power of the defendants, acting singularly, collectively . . . and otherwise."); *id.* ¶ 56 ("The various cost reports, requisitions, billing statements and/or requests for reimbursement submitted by the defendant NIST participants from and after 2002, through, at least, September, 2005, and, in many instances, continuing to the present, all contained false claims for reimbursement and made false statements to NIST concerning work performed by them and/or consulting services rendered to NIST *because the true nature and intent was to mislead NIST and to cause a false causal statement concerning what caused the destruction of the WTC complex to occur.*" (emphasis added)); *id.* ¶¶59-60 (similar allegations).

These allegations are plainly insufficient under Rule 9(b). As the district court observed: the Amended Complaint "do[es] not cite to a single identifiable record or billing submission they claim to be false, or give a single example of when a purportedly false claim was presented for payment by a particular defendant at a specific time." *Wood*, 2008 WL 2566728, at * 5. Although scienter may be

demonstrated by inference under Rule 9(b), that is not a "license to base claims of fraud on speculation and conclusory allegations." *O'Brien*, 936 F.2d at 676. While Wood may genuinely believe that the analysis and information provided by the Contractor Defendants is incorrect, that assertion - even accompanied by supporting evidence for Wood's own theory - does not warrant an inference that the services provided by the Contractor Defendants, and claims for payment submitted therewith, were fraudulent. We agree with the district court that the proposition that "NIST ultimately failed to conclude, consistent with [Wood's] hypothesis, that the Twin Towers was destroyed by the military's directed energy weapons,: *Wood,* 2008 WL 2566728, at *4, falls short of the "ample factual basis [needed] to support [Wood's] charges." *O'Brien*, 936 F .2d at 676. Accordingly, we find that the district court appropriately dismissed Wood's Amended Complaint for failure to comply with Fed. R. Civ. P. 9(b).

II. Leave to Amend

Wood seeks leave to amend the Amended Complaint to cure her failure to conform with Rule 9(b). "Although the decision of whether to allow plaintiffs to amend their complaint is left to the sound discretion of the district court, there must be good reason to deny the motion. One good reason to deny leave to amend is when such leave would be futile." *Acito v. IMCERA Group, Inc.*, 47 F.3d 47, 55 (2d Cir. 1995); *see also Aetna Cas. and Sur. Co. v. Aniero Concrete Co., Inc.*, 404 F.3d 566, App. A, 584

(2d Cir. 2005) ("Leave to amend may be denied following a Rule 9(b) dismissal if an amendment would be futile."). The district court dismissed Wood's Amended Complaint with prejudice, but did not address the request for leave to amend in Wood's briefing below. *See* J.A. 672. Nonetheless, "[i]t is within the court's discretion to deny leave to amend implicitly by not addressing the request when leave is requested informally in a brief filed in opposition to a motion to dismiss." *In re Tamoxifen Citrate Antitrust Litigation*, 466 F.3d 187, 220 (2d Cir. 2006).

Our review of the record, as well as Wood's argument to this Court as to why leave to amend should be granted, convince us that the district court acted within its discretion. Wood vaguely asserts that she should be allowed to amend the Amended Complaint as follows:

> Certainly, [Wood's] affidavits and other materials show that if a complaint were intended to be highly detailed, rather than, ultimately, a form of "notice" then she could have done that; namely, she could have provided a much more highly detailed complaint all as is confirmed by her prior Affidavits and their attachments . . . .

Plaintiff's Br. 38. Again, in explaining the assertion that Wood "merits leave to further amend her complaint to provide . . . available particularity," Wood does not explain what this particularity might consist of, and merely argues that the Amended Complaint "tells us that the [Contractor Defendants] purposely turned a blind eye towards

the fraud of not explaining what caused the destruction of the WTC, while purportedly doing just that." *Id.* 40-41. This is an inadequate basis to disturb the district court's discretionary decision to deny Wood leave to amend. *See Brandt v. Davis*, 191 F.3d 887, 893 (8th Cir. 1999) ("In Brandt's motion to amend before the district court, and in his argument on appeal, he neglected to explain how he would amend the complaint to save the claim. We therefore find no abuse of discretion in the district court's denial of his motion to amend." (internal citation omitted)); *Doe v. Howe Military School*, 227 F.3d 981, 989 (7th Cir. 2000) (finding that "the district court did not abuse its discretion in denying the Does' motions to amend the pleadings" where their "motions did not state what specifically the Does planned to allege in their amended pleadings"). Finally, Wood's suggested amendments in her reply brief come too late, *see, e.g., EDP Med. Computer Sys., Inc. v. United States*, 480 F.3d 621, 625 n.1 (2d Cir. 2007) ("Although EDP did belatedly contend in its reply brief that the district court erred in its finding on these elements, its failure to press those arguments in its opening brief waives them."), and, in any event, are merely assertions in support of Wood's theory that directed energy weapons brought down the Twin Towers, *see* Plaintiff's Reply Br. 30-32 - not specifics relating to fraudulent claims or statements made by the Contractor Defendants, which are required to comply with Rule 9(b).

Accordingly, we find that the district court did not abuse its discretion in dismissing Wood's Amended Complaint with prejudice.

III. Sanctions

Without formally appealing the district court's decision to the contrary, see S.A. 1248 n.15, Contractor Defendants Simpson, Gumpertz & Hager, Inc. ("SGH") and Computer Aided Engineering Associates, Inc. ("CAEA"), ask this Court to award them attorney's fees pursuant to 31 U.S.C. § 3730(d)(4). We review a district court's decision to grant attorney's fees under this provision for abuse of discretion. *Mikes v. Straus*, 274 F.3d 687, 704 (2d Cir. 2001). Bearing "in mind that an award of attorneys' fees is well suited to the daily operations of the district court because such a decision may ultimately combine extensive fact finding ability with a large degree of discretion," *id.*, and the failure of SGH and CAEA to mount a cross-appeal, we decline to disturb the district court's exercise of discretion to warn, rather than sanction, Wood and her counsel.

IV. Conclusion

We have considered all of Wood's arguments bearing on the adequacy of the pleadings in the Amended Complaint and Wood's request for leave to amend. We find them to be without merit, and as such, the district court's dismissal of Wood's claim with prejudice pursuant to Fed. R. Civ. P. 9(b) is AFFIRMED. Wood's motion to strike one of the two briefs filed by the Contractor Defendants is DISMISSED as moot.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk
By: _____

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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MEMORANDUM DECISION
AND ORDER - 07 CV 3314 (GBD)

DR. JUDY WOOD on behalf of the
UNITED STATES OF AMERICA,

Plaintiff/Relator,

-against-

APPLIED RESEARCH ASSOCIATES, INC.; SCIENCE APPLICATIONS INTERNATIONAL CORP.; BOEING; NuSTATS; COMPUTER AIDED ENGINEERING ASSOCIATES, INC.; DATASOURCE, INC.; GEOSTAATS, INC.; GILSANZ MURRAY STEFICEK LLP; HUGHES ASSOCIATES, INC.; AJMAL ABBASI; EDUARDO KAUSEL; DAVID PARKS; DAVID SHARP; DANIELE VENEZANO; JOSEF VAN DYCK; KASPAR WILLIAM; ROLF JENSEN & ASSOCIATES, INC.; ROSENWASSER GROSSMAN CONSULTING ENGINEERS, P.C.; SIMPSON GUMPERTZ & HEGER, INC.; S.K. GHOSH ASSOCIATES, INC.; SKIDMORE, OWING & MERRILL, LLP; TENG & ASSOCIATES, INC.; UNDERWRITERS LABORATORIES, INC.; WISS, JANNEY, ELSTNER ASSOCIATES, INC.; AMERICAN AIRLINES; SILVERSTEIN PROPERTIES; and UNITED AIRLINES,

Defendants.

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GEORGE B. DANIELS, District Judge:

In separate actions,[1] three different plaintiffs, who are all represented by the same attorney, commenced individual lawsuits attempting to challenge the investigative findings, of the National Institute of Standards and Technology ("NIST"), as to how and why the World Trade Center buildings collapsed on 9/11. The focus of the NIST investigation was on the sequence of events "from the instance of aircraft impact to the initiation of collapse for each tower." Plaintiffs claim that a terrorist attack was not responsible for the destruction of the World Trade Center complex ("WTC"). According to plaintiffs, the evidence demonstrates that the destruction of the World Trade Center Towers was caused by a United States secret military "directed energy weapon."[2] Plaintiffs' attorney argues that "the defendants knowingly participated in the fraud of furthering the false claim that two wide-body jetliners hit the World

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[1] The three related cases that are pending before this Court are: Wood v. Applied Research Associates, Inc., et al., 07 CV 3314 (GBD); Reynolds v. Science Applications Ina et al., 07 CV 4612 (GBD) and Haas v. Gutierrez, et al., 07 CV 2623 (GBD).

[2] Plaintiffs also claim that there is significant evidence that the cause of the destruction of World Trade Center building number 7 was a controlled demolition.

Trade Center on 9/11/01."[3] (Reynolds Opp'n Mem. at 1).

Congress authorized NIST, a non-regulatory agency within the United States Department of Commerce, to conduct the technical investigation into the structural failings leading to the collapse of the Twin Towers and the building located at 7 World Trade Center("WTC7").[4] On October 16,

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[3] Reynolds argues that "[t]his case involves the fraud perpetrated by the jetliner crash hoax." (Reynolds Opp'n Mem. at 6). Wood refers to "... the expressed myth of 9/11 that 19 Arabs did it with box cutters." (Wood Opp'n Mem. at 13). Haas contends that "World Trade Center building number 7 (WTC7) ... was not damaged in any way by any jetliner impact ..." "There is evidence of a controlled demolition ... that NIST is overtly seeking to squelch ..." (Haas Opp'n Mem. at 14).

[4] As a result of the collapse of the WTC, the National Construction Safety Team Act (the "Act"), 15 U.S.C. § 1703 *et seq*., was enacted. The purpose of the Act "is to improve the structural integrity of buildings and evacuation and emergency response procedures by investigating building failures and recommending specific improvements to building standards, codes, and practices, as well as to evacuation and emergency response procedures." H.R. Rep. No. 107-530, at 5 (2002) *reprinted in* 2002 U.S.C.C.A.N. 941, 941. Although the primary focus of the Act is on future building collapses, it nevertheless "gives NIST comprehensive authority to complete the investigation of the WTC disaster."Id.. at 14, 950; see also 15 U.S.C. § 7311 ("The authorities and restrictions applicable under this chapter ... shall apply to the activities of the National Institute of Standards and Technology in response to the

2005, NIST issued its "Final Report on the Collapses of the Twin Towers of the World Trade Center;" which report is referred to as "NCSTAR 1." NIST's investigation into the collapse of WTC7 is still proceeding.

Plaintiffs Judy Wood and Morgan Reynolds each independently sued the same non-governmental defendants who allegedly provided consulting and other services to NIST in connection with the NCSTAR 1 report.[5] Plaintiff Edward Haas sued both governmental and non-governmental actors who are allegedly responsible for conducting the investigation itself, or have provided services as

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attacks of September 11, 2001.").

[5] Plaintiffs Wood and Reynolds sued the following twenty-seven defendants: Science Applications International Corp.; Applied Research Associates, Inc.; Boeing; NuStats; Computer Aided Engineering Associates, Inc.; DataSource, Inc.; GEOSTAATS, Inc.; Gilsanz Murray Ste-leek LLP; Hughes Associates, Inc.; Ajmal Abbasi; Eduardo Kausel; David Parks; David Sharp; Daniele Venezano; Josef Van Dyck; Kaspar William; Rolf Jensen & Associates, Inc.; Rosenwasser/Grossman Consulting Engineers, P.C.; Simpson Gumpertz & Heger, Inc.; S.K. Ghosh Associates, Inc.; Skidmore, Owings & Merrill, LLP; Teng & Associates, Inc.; Underwriters Laboratories, Inc.; Wiss, Janney, Elstner Associates, Inc.; Silverstein Properties; American Airlines and United Airlines.

Plaintiff Reynolds subsequently dismissed his action against Silverstein Properties, American Airlines and United Airlines.

part of that investigation.[6] All defendants, in each of the three actions, moved to dismiss the lawsuits as being frivolous, and for lack of federal subject matter jurisdiction and failure to state a claim, pursuant to Fed.R.Civ.P. 12(b)(1) and (6), respectively. The motions to dismiss are granted and all three complaints are dismissed with prejudice.

Plaintiffs assert that NIST's investigation is tainted by fraud and other serious misconduct. They contend that the NCSTAR 1 report constitutes a "fraudulent document," in that it conceals the true cause for the collapse of the Twin Towers. Plaintiffs maintain that the alleged fraudulent nature of the investigation has furthered the deception,

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[6] Plaintiff Haas sued the following defendants in both their individual and official capacities: Carlos M. Gutierrez, Secretary, United States Department of Commerce; NIST's Acting Director James Turner (pursuant to Fed.R.Civ.P. 25(d); Acting Director Turner is automatically substituted for his predecessor, William A. Jeffrey); Dr. Shyam Sunder, NIST's Lead Investigator; Dr. Theresa McAllister, NIST's Research Structural Engineer; and Catherine Fletcher, Chief of NIST's Management and Organization Division. Haas also named as defendants "John Doe I-V, Contractors Employed by NIST," as well as three defendants, who were also sued by plaintiffs Wood and Reynolds, *to wit*, Silverstein Properties, Applied Research Associates, Inc., and Science Applications International Corp. In plaintiff Haas' proposed second amended complaint, he only names the Secretary of Commerce and NIST officials as defendants.

perpetrated upon the masses, that the WTC was demolished as a result of terrorists plowing two commercial airplanes, filled with thousand of gallons of jet fuel, directly into the Twin Towers at a high rate of speed.[7] They claim that, through the employment of psychological operations, millions were deceived into believing that the destruction was caused by a terrorist hijacking that murdered thousands of innocent people inside. Plaintiffs theorize that what actually occurred was that the Twin Towers disintegrated after being struck by the United States military's secret laser-like weaponry. All three plaintiffs explain that these "directed energy weapons" "are operational in Earth['s] orbit, at high altitude, low altitude, at sea and on land, ranging in lethality from the capacity to do great damage such as that of destroying the World Trade Center Twin Towers in less than 10 seconds each, as occurred on 9/11/01, down to and including imposition of a disabling stun on human beings for crowd control and/or other psy ops [psychological operations] purposes." (Wood Am. Compl. ¶23; Reynolds Compl.¶22; Haas Am. Compl ¶ 25).

Plaintiffs Wood and Reynolds commenced their respective individual actions on behalf of the United States Government for violations of the False Claims Act ("FCA"), 31 U.S.C. § 3729 et seq.,

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[7] Plaintiffs' lawsuits make no allegation with regard to the hijacking of United Airlines Flight 93, which crashed in a field just outside Shanksville, Pennsylvania, or the hijacking of American Airlines Flight 77, which was crashed into the Pentagon in Arlington, Virginia.

claiming that the defendants hired by the Government were not entitled to payment for the allegedly fraudulent services they provided to NIST.[8] The False Claims Act prohibits a person from attempting to get a fraudulent claim for payment approved by the Government, or using false records to reduce the amount one owes to the Government. In plaintiff Haas' separate individual lawsuit, he seeks to enjoin NIST from continuing its investigation into the collapse of WTC7 on the grounds that NIST has violated the Information Quality Act[9] by intentionally disseminating

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[8] Both plaintiffs Wood and Reynolds have asserted the same causes of action for violations of three provisions of § 3729(a) which imposes liability upon:

"Any person who - -

(1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government ... a false or fraudulent claim for payment or approval;

(2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government; [or]

. . . . . .

(7) knowingly makes, uses or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government[.]

31 U.S.C. § 3729(a)(1-2), (7).

[9] The Information Quality Act directs "the Office of Management and Budget ["OMB"] ... [to] issue guidelines ... that provide policy and procedural guidance to Federal agencies for ensuring and maximizing the quality,

contradictory information to the public and concealing the existence of a controlled demolition event at WTC7.[10] The aim of the Information

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objectivity, utility, and integrity of information ... disseminated by Federal agencies ..." Pub. L. No. 106-554, § 1(a)(3) [Title V, § 515], Dec. 21,2000, 114 Stat. 2763, 2763A-153, published at 44 U.S.C. § 3516, note. It further requires that each federal agency "establish administrative mechanisms allowing affected persons to seek and obtain correction of information maintained and disseminated by the agency that does not comply with the guidelines issued" by the OMB. Id.

[10] Plaintiff Haas submitted a "Request for Correction" to NIST claiming that a statement appearing in a December 12, 2006 NIST document was contrary to a statement in the NCSTAR 1 report. Although both documents indicate that there was no "**evidence**" of a controlled demolition event, the NCSTAR 1 report further refers to the lack of "**corroborating**" evidence that the towers were brought down by controlled demolition. Haas argued to NIST that the phrase "'corroborating evidence,' by definition, indicates that there was some evidence of controlled demolition ..." (Haas Am. Compl. Ex. A, at 26). Unable to secure a forbearance agreement from NIST, Haas commenced the instant action seeking a preliminary and permanent injunction enjoining NIST from continuing its investigation until the outcome of his request for correction was known. NIST has since denied his application, and Haas now seeks leave to file a second amended complaint claiming NIST should be enjoined from continuing its technical investigation until: (1) valid information is dissemination to the public; and (2) a criminal investigation into the controlled demolition of WTC7 is initiated and the outcome thereto is known. (Haas Opp'n Mem. at 18; Haas Aff'd ¶¶

Quality Act is to assure that the information publicly released by a federal agency is of the highest quality. It requires the dissemination of true and accurate information, and a mechanism for individuals, affected by that information, to seek and obtain a correction of false or inaccurate information. None of plaintiffs' asserted legal claims can withstand defendants' motions to dismiss.

NO COURT HAS SUBJECT MATTER JURISDICTION OVER PLAINTIFFS' CLAIMS

The False Claims Act affords a private individual the right to sue in federal court, on behalf of the Government, any person who knowingly presents or makes a false or fraudulent claim for payment. See, 31 U.S.C. § 3730(4)(A), (B). An individual is, however, jurisdictionally barred from bringing a FCA action that is based upon publicly disclosed information, unless the individual bringing the action is an "original source" of the information.[11] To be an "original source" of publicly

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18-19).

[11] Section 3730(e)(4)(A) provides:
No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administration or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

disclosed information, a plaintiff must have direct and independent knowledge of information on which the lawsuit's allegations are based, and have voluntarily provided such information to the Government prior to filing the action. See, § 3730(e)(4)(B); Rockwell Intl Corp. v. United States, - - U.S. - , 127 S.Ct. 1397, 1407 (March 27, 2007). To even attempt to assert this type of lawsuit, plaintiff must possess and be an original source of at least the substantive information publicly disclosed about the particular fraud. See, United States ex rel. Smith v. Yale Univ., 415 F.Supp.2d 58, 72 (D.Conn. 2006) (*quoting* United States ex rel. Stinson, Lyons, .Gerlin & Bustamante,Y.A. v. Prudential Ins. Co., 944 F.2d 1149, 1160 (3d Cir. 1991)). A party lacks direct and independent knowledge "if a third party is 'the source of the core information' upon which the ... complaint is based." United States v. New York Med. Coll., 252 F.3d 118, 121 (2d Cir. 2001) (*quoting* United States ex rel. Kreindler & Kreindler v. United Techs. Corp., 985 F.2d 1148, 1159 (2d Cir. 1990)).

The allegations in plaintiffs' complaints are based entirely on information made publicly available through NIST's administrative investigation, the administrative report resulting therefrom (*i.e*, NCSTAR 1), a prior civil action[12] and

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31 U.S.C. § 3730 (e)(4)(A) (footnote omitted).

[12] In their respective complaints, plaintiffs allege that defendant Underwriters Laboratories, Inc. ("UL") "overtly suppressed [ ] information [from NIST] by terminating the

various media accounts. Their lawsuits simply rely upon their own theoretical examination of information already within the public domain. Plaintiffs' attempted analysis of that information constitutes pure speculation that the NIST participants were involved in a cover-up to conceal the true cause for the towers' collapse. They merely disagree with NIST's investigative findings, and specifically wish to reject the basic factual premise that terrorist destroyed the Twin Towers using passenger-filled airplanes as missile-like weapons. Plaintiffs, understandably, offer nothing more than conjecture and supposition to support their claim that the towers were struck by high powered energy beams. Their personal hypothesis about what should be concluded from publicly disclosed information does not qualify either of them as an

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services of one of its employees, Kevin Ryan, who called attention to [the] incongruity of causal explanation." (Wood Am. Compl. ¶39; Reynolds Compl. ¶37). Prior to the commencement of the cases at bar, Kevin Ryan filed suit against UL claiming he was wrongfully discharged because he had sent an e-mail to NIST indicating that: UL had conducted WTC-related metallurgical testing; the official explanation for the destruction of the WTC was not supported by a scientific analysis of the evidence; and there was substantial evidence that all three buildings collapsed from explosive devices. (Ryan v. Underwriters Labs., Inc., No. 06-1770 (S.D.Ind. filed Nov. 16, 2006). Thus, the information at the heart of the Wood and Reynolds litigation "was publicly disclosed because it was available to anyone who wished to consult the [Ryan] court file." Kreindler, 985 F.2d at 1158.

original source of information in order to sustain an individual FCA claim on behalf of the Government. See, Kreindler, 985 F.2d at 1159; see also, New York Med. Coll., 252 F.3d at 121-22. Federal jurisdiction over a private FCA action is not created simply by arguing that the review of publicly disclosed information spurs plaintiffs to advance a different theory. Such an argument, based solely on publicly available information, could no more support a federal lawsuit to advance an alternative theory regarding the assassination of President Kennedy, or whether men ever actually landed on the moon.

In addition to the FCA claims, plaintiff Reynolds also asserts State common law causes of action for unjust enrichment, payment by mistake, recoupment of overpayment, and fraud.[13] However, as plaintiffs' attorney acknowledges, the Congressional grant of private standing to sue in FCA cases does not extend to common law causes of action. See, United States ex rel. Phipps v. Comprehensive Cmty. Dev. Corp., 152 F.Supp.2d 443, 451-52 (S.D.N.Y. 2001); see also United States ex rel. Rockefeller v. Westinghouse Elec. Co., 274 F.Supp.2d 10, 14 (D.D.C. 2003), *aff'd sub nom.*

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[13] Plaintiff Wood asserted these common law causes of action in her original complaint. In her amended complaint, she indicates that her action is being brought "under the common law or equitable theories of unjust enrichment, payment under mistake of fact, recoupment of overpayments and common law fraud." (Wood Am. Compl. 1). Nevertheless, no basis for any common law claims are specifically pled in her amended complaint.

Rockefeller ex rel. United States v. Washington TRU Solutions, LCC, 2004 WL 180264 (D.C.Cir. Jan. 21, 2004). Plaintiffs asserted these common law claims in a representative capacity on behalf of the United States Government. Neither plaintiffs claim to be personally aggrieved or damaged as a result of the defendants' alleged wrongdoing. All common law claims are, therefore, dismissed for lack of standing. Accordingly, plaintiffs Wood and Reynolds' actions are barred for lack of subject matter jurisdiction.

PLAINTIFFS' PLEADINGS ARE WHOLLY INSUFFICIENT TO SUPPORT A LAWSUIT

Even if the requisite jurisdiction had existed, dismissal of plaintiffs' complaints is independently warranted, pursuant to Fed. R. Civ. P. 12(b)(6), for failure to state a claim and for failure to plead fraud with the requisite particularity mandated by Fed. R. Civ. P. 9(b).[14]

To survive a Rule 12(b)(6) motion to dismiss, the factual allegations in the complaint "must create the possibility for a right to relief that is more than speculative."[15] Spool v. World Child Int'l

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[14] The implausabily of plaintiffs' theories warrants no further consideration by this Court beyond the insufficiency of the legal claims upon which plaintiffs attempt to advance those theories in their lawsuits.

15 The sufficiency of the pleadings is determined by examination of the complaint, the exhibits attached thereto, and matters incorporated by reference therein. Other

Adoption Agency, 520 F.3d 178, 183 (2d Cir. 2008). Although complaints generally "do[ ] not need detailed factual allegations, [ ] plaintiff[s'] obligation to provide the grounds of [their] entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Bell Atl. Corp. v. Twombly, 550 U.S. - -, 127 S.Ct. 1955, 1964-65 (May 21, 2007) (internal citations, quotation marks and original brackets omitted). Plaintiffs' theories about the cause of the 9/11 disaster completely fail to state a cognizable claim for relief.

To state a FCA claim, plaintiffs must sufficiently allege that defendants knowingly presented a false or fraudulent claim; knowingly made or used a false record or statement to get a fraudulent claim paid; or knowingly made or used a false record or statement to decrease their obligation to pay the Government. The theory of plaintiffs' lawsuit is that the defendants violated the FCA because they were not entitled to any remuneration for the services they rendered to NIST since NIST ultimately failed to conclude, consistent with plaintiffs' hypothesis, that the Twin Towers was destroyed by the military's directed energy weapons. The results of defendants' evaluations are incompatible with plaintiffs' own interpretations. This does not, however, give rise to

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independent submissions made by the defendants, with regard to the jurisdictional challenge, were not considered in assessing the legal adequacy of the complaints.

a reasonable inference that defendants are not entitled to any compensation from the Government for the services they provided. See, Wang v. FMC Corp., 975 F.2d 1412, 1421 (9th Cir. 1992); United States ex rel. Swafford v. Borgess Med. Ctr., 98 F.Supp.2d 822, 833 (W.D.Mich. 2000), *aff'd* 24 Fed.Appx. 491 (6' Cir. 2001).

Plaintiffs have pled no factual allegations to support a reasonable inference that defendants knowingly sought payment from the government to which they were not entitled. Plaintiffs wish to reach the conclusion that no compensation was owing to defendants by relying on the other self-serving conclusion that the services they rendered were worthless. In plaintiffs' view, defendants would only be entitled to compensation if NIST had acknowledged plaintiffs' theory that directed energy weapons, and not a terrorist attack, was responsible for the destruction of the WTC. Seeking payment for services rendered to NIST is not unlawful simply because the plaintiffs themselves disagree with NIST's investigative findings. See generally Mikes v. Straus, 274 F.3d 687, 703 (2d Cir. 2001) ("In a worthless services claim, the performance of the service is so deficient that for all practical purposes it is the equivalent of no performance at all."). Even purported errors based on flawed reasoning, mathematic calculations, or scientific judgments are not false for purposes of the FCA. See, Pfingston v. Ronan Eng'g Co., 284 F.3d 999, 1003 (9th Cir. 2002); Wang, 975 F.2d at 1421; United States ex rel. Taylor v. Gabelli, 345 F.Supp.2d 313, 329 & n.87 (S.D.N.Y. 2004).

Furthermore, plaintiffs have failed to plead any factual allegations to support their FCA claims asserted under "the 'reverse false claims' provision, § 3729(a)(7), which creates FCA liability for false statements designed to conceal, reduce, or avoid an obligation to pay money or property to the Government." United States ex rd. Lissack v. Sakura Global Capital Mkts., Inc., 377 F.3d 145, 152 (2d Cir. 2004). "This section was added 'to provide that an individual who makes a material misrepresentation to avoid paying money owed the Government would be equally liable under the Act as if he had submitted a false claim to receive money." United States ex rel. Bahrani v. Conagra, Inc., 465 F.3d 1189, 1194-95 (le Cir. 2006) (*quoting* S.Rep. No. 99-345, at 18, *reprinted in* 19.86 U.S.C.C.A.N. 5266, 5283 (1986)). Plaintiffs cannot identify any existing financial obligation any of the defendants owed to the Government, nor can they identify any specific false record or statement that a defendant made to avoid such a purported obligation. The pleadings are therefore also insufficient to state a reverse false claims cause of action.

Plaintiffs have not only failed to comply with the liberal pleading standards applicable to a consideration of a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), they have also failed to meet the stricter pleading standard under Fed. R. Civ. P. 9(b). Claims asserted under the FCA, an anti-fraud statute, are also subject to Rule 9(b)'s heightened pleadings standard, requiring averments of fraud to be pled with particularity. Gold v. Morrison-Knudsen Co., 68 F.3d 1475, 1476-

77 (2d Cir. 1995); see also, Eisenstein v. Whitman, 4 Fed.Appx. 24, 26 (2d Cir. 2001). Plaintiffs' counsel acknowledges that to satisfy Rule 9(b) "the Second Circuit has said that the complaint must: (1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statement were made, and (4) explain why the statements were fraudulent." (Reynolds Opp'n Mem. at 35 (internal quotation marks and citation omitted)). Plaintiffs argue that their pleadings comply with the Second Circuit criteria because they (1) identify the subject statements as being "each and every time during a two plus- year period that defendants made false claims for payments based on fraudulently performed work"; (2) "adequately alleges the 'identity of the speaker' as being these defendants"; (3) "adequately pleads 'where and when the statements were made.' They were made in NCSTAR 1"; and (4) explains the statements were fraudulent because they concealed the true cause for the Twin Towers' collapse. Id. at 36). Such general and conclusory pleadings fall far short of Rule 9(b)'s pleading standard.

Plaintiffs vaguely allege that, for a number of years, all defendants wrongfully sought payment for services performed in bad faith.[16] They do not cite to

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[16] Both the Wood and Reynolds complaints allege, in pertinent part:

The various cost reports, requisitions, billing statements and/or requests for reimbursements submitted by the defendant NIST participants ... all contain false claims for reimbursement and made false statements ... because the true nature and intent was to mislead NIST and to cause a

a single identifiable record or billing submission that they claim to be false, or give a single example of when a purportedly false claim was presented for payment by a particular defendant at a specific time. Additionally, plaintiffs' general attribution, to the defendants, of the purported false statements published in the NCSTAR 1 report is untenable to support a particularized pleading of fraud. Defendants are not the authors of the report, and plaintiffs point to no specific factual assertion relied upon in the report that was allegedly falsely provided by defendants to NIST.

Plaintiffs merely allege the existence of a nefarious conspiracy of epic proportion. They name all defendants as coconspirators. They therefore conclude that all defendants' work records and the services they performed are fraudulent because they are tainted by the illegal conspiracy in which they participated. Such generalized attempts at fraud pleading fail to meet the requirements of Rule 9(b). See, United States ex rel. Joshi v. St. Luke's Hosp..,Inc., 441 F.3d 552, 556-57 (8th Cir. 2006) (Alleging all work performed by defendants was illegal and every invoice fraudulent because of an

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false causal statement concerning what caused the destruction for the WTC complex to occur. *** All such submitted cost reports, invoices, reimbursement claims and the like constitute false claims under the False Claims Act because the defendants knew ... that the actual cause of the destruction of the WTC complex was the result of the use of directed energy weapons.

(Wood Am. Compl. ¶¶ 56, 59-60; Reynolds Compl. 54, 57-58).

underlying conspiracy to submit fraudulent claims fails to satisfy Rule 9(b)); United States ex rel. Aflatooni v. Kitsap Physicians Serv., 314 F.3d 995, 1002 (9th Cir. 2002) ("The False Claims Act [ ] focuses on the submission of a claim, and does not concern itself with whether or to what extent there exists a menacing underlying scheme.").

Plaintiff Haas' complaint, for violations of the Administrative Procedure Act, 5 U.S.C. § 551, *et seq.* is also insufficiently pled.[17] His claim is premised on NIST's failure to suspend its investigation while his request, seeking a change of information, was under consideration. Because that request has since been denied by NIST, his causes of action, relating to the existence of a pending request, no longer even presents a live controversy for which relief would be available, and is therefore moot. See, White River Amusement Pub, Inc. v. Town of Hartford, 481 F.3d 163, 167-68 (2d Cir. 2007).

Plaintiff Haas, however, argues that his claim now, as alleged in his proposed amended complaint, is actually premised on the alleged intentional dissemination of contradictory information by NIST, in violation of the Information Quality Act. He seeks an order of forbearance

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[17] The complaints also state that Haas is suing, under Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971), for violations of his Fifth Amendment Due Process rights. The complaints, however, fail to contain any factual allegations to support such a claim, and no constitutional cause of action is specifically pled.

requiring NIST to cease its investigation "until valid (i.e. quality) information has been disseminated in place of the currently contradictory information available to the public.[18] (Haas Opp'n Mem. at 18). Plaintiff's proposed alternative legal theory is unavailing. The Information Quality Act does not create any legal rights, enforceable by unrelated third parties, to information or its correctness. See, Salt Inst. v. Leavitt, 440 F.3d 156, 159 (4th Cir. 2006); Ams. for Safe Access v. United States Dep't of Health & Human Servs., 2007 WL 2141289, at *4 (N.D.Cal. July 24, 2007); In re Operation of the Missouri River Sys. Litig., 363 F.Supp.2d 1145, 1174 (D.Minn. 2004), *aff'd in part and vacated in part on other grounds* 421 F.3d 618 (8th Cir. 2005). Neither the Information Quality Act, nor the Administrative Procedure Act, create a private right of action upon which plaintiff may independently pursue this litigation.

Regardless of how plaintiff Haas attempts to characterize his "forbearance" claims, dismissal is

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[18] Haas further "claims [ ] that there is evidence that warrants a parallel criminal investigation into whether or not there was a motive and opportunity for those that might have had prior knowledge of the September 11, 2001 attacks, to take advantage of the event and destroy WTC7 for yet to be fully understood purposes." (Haas Aff'd ¶ 10). Plaintiff contends that "[s]uch a criminal investigation could reveal that the direction NIST is heading with its technical investigation into the WTC7 failure is completely without merit." (Id.). He therefore argues that NIST's "technical investigation [should be] halted until the outcome of the criminal investigation is determined." (Id. ¶18).

warranted, pursuant to Fed.R.Civ.P. 12(b)(6), for failure to state a claim. NIST is not legally required to cease its congressionally mandated investigation every time an interloper questions the accuracy of one of its statements. Such a forbearance policy would indefinitely delay significant investigations. An influx of illegitimate requests that information be changed would effectively cripple the process. Hence, defendants' motion to dismiss Haas' first amended complaint is granted. Plaintiff Haas' motion to file a second amended complaint is denied on the grounds of futility.[19]

CONCLUSION

The defendants' motions to dismiss, tiled in each of these three cases, are granted. All three complaints

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[19] The non-governmental defendants' motions for sanctions, pursuant to 31 U.S.C. § 3730(d)(4) and Fed.R.Civ.P. 11, are denied. A belief, no matter how incredible, that the WTC was destroyed using secret exotic weaponry, does not give rise to even a colorable claim for relief. All plaintiffs, as well as the attorney for the plaintiffs here, are hereby warned that filing further successive untenable actions may result in the imposition of monetary or other serious sanctions. See, Catanzano v. Wallenstein, 142 Fed.Appx. 540 (2d Cir. 2005); Iwachiw v. New York City Bd. of Elections, 126 Fed.Appx. 27, 29-30 (2d Cir. 2005); Pentagen, Techs. Intl Ltd. v. United States, 172 F.Supp.2d 464 (S.D.N.Y. 2001), affd 63 Fed.Appx. 548 (2d Cir. 2003).

are dismissed with prejudice.[20] The Wood v. Aptilied Research Associates. Inc., et al.. 07 CV 3314 (GBD); Reynolds v. Science Applications intl. *et al*., 07 CV 4612 (GI3D), and Haas v. Gutierrez, *et al*, 07 CV 2623(GBD) actions are hereby closed.

Dated: New York, New York
June 26, 2008

SO ORDERED:

GEORGE B. DAN1ELS
United States District Judge

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[20] Dismissal is appropriate as to all defendants, including those who have yet to be served. See, Eisenstein, 4 Fed.Appx, at 26 n.2 (*quoting* Leonhard v. United States. 633 F.2d 599, 608 (2d Cir. 1980).

No. 09-0548

IN THE

Supreme Court of the United States

JUDY WOOD ON BEHALF OF THE UNITED STATES OF AMERICA,

Petitioner,

v.

APPLIED RESEARCH ASSOCIATES, INC., SCIENCE APPLICATIONS INTERNATIONAL CORP., COMPUTER AIDED ENGINEERING ASSOCIATES, INC., DATASOURCE, INC., GEOSTATS, INC., GILSANZ MURRAY STEFICEK, LLP, HUGHES ASSOCIATES, INC., AJMAI ABASSI, EDUARDO KAUSEL, DAVID PARKS, DAVID SHARP, DANIELE VENEZANO, JOSEPH VAN DYCK, KASPAR WILLIAM, ROLF JENSEN & ASSOCIATES, INC., ROSENWASSER/GROSSMAN CONSULTING ENGINEERS, P.C., SIMPSON GUMPERTZ & HEGER, INC., S.K. GHOSH ASSOCIATES, INC., SKIDMORE OWINGS & MERRILL, LLP, TENG & ASSOCIATES, INC., UNDERWRITERS LABORATORIES, INC., WISS, JANNEY ELSTNER ASSOCIATES, INC. AND UNITED AIRLINES,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENTS, SIMPSON GUMPERTZ & HEGER, INC. AND COMPUTER AIDED ENGINEERING ASSOCIATES, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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CORPORATE DISCLOSURE STATEMENT

Respondent Simpson, Gumpertz & Heger, Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.

Respondent Computer Aided Engineering Associates, Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.

QUESTIONS PRESENTED

I. Whether a False Claims Act complaint which was dismissed pursuant to Fed. R. Civ. P. 9(b) for failure to provide any specific time, place or speaker of any alleged misrepresentation made by any defendant can automatically be amended based on the enactment of the Fraud Enforcement and Recovery Act, even if the modifications to the False Claims Act were not germane to the case.

II. Whether petitioner should be permitted to amend her complaint when the amendment would be futile because petitioner's False Claims Act complaint is premised on the flawed conclusion that the World Trade Center towers were destroyed by the United States military's directed energy weapons, rather than airplanes striking the towers.

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STATEMENT OF THE CASE

On April 25, 2007, the Petitioner, Judy Wood ("Wood") commenced this action under the False Claims Act, 31 U.S.C. §§ 3729-33 by filing a *qui tam* Complaint under seal in the United States District Court for the Southern District of New York ("the District Court") against twenty-seven defendants including respondents Simpson Gumpertz & Heger, Inc. ("SGH") and Computer Aided Engineering Associates, Inc. ("CAE"). On September 12, 2007, the District Court (George B. Daniels, U.S.D.J.) entered an Order unsealing the Complaint and authorizing service. Wood, however, did not serve the Complaint on SGH, CAE, or the other defendants. On December 28, 2007, Wood filed a First Amended Complaint and took steps to effectuate service on the defendants. The First Amended Complaint alleged three causes of action under the False Claims Act ("FCA"): (1) Presentation of False Claims, (31 U.S.C. § 3729(a)(1)); (2) Making or Using False Record or Statement, (31 U.S.C. § 3729(a)(2)); and (3) Reverse False Claims, (31 U.S.C. § 3729(a)(7)).

Wood's claims against the defendants stem from her challenge to the investigative findings of the National Institute of Standards and Technology ("NIST") as to how and why the World Trade Center ("WTC") buildings collapsed after terrorist attacks on September 11, 2001. Wood claims that a terrorist attack was not responsible for the destruction of the WTC. Instead, she alleges that directed energy weapons ("DEW") in the possession of the United States military destroyed the WTC. Wood claims that all defendants participated in a fraud by con-

cluding in the NIST investigation that the impact of airplanes caused the collapse of the WTC.

Pursuant to motions of the defendants, including by CAE and SGH, on June 26, 2008, the District Court dismissed the First Amended Complaint finding *inter alia* that the District Court did not have subject matter jurisdiction over the claims because Wood was not the "original source" of information on which she relied to assert her claims under the FCA. The District Court held that Wood relied on publicly available information contained in the NIST administrative report ("NCSTAR 1"). The District Court also dismissed the First Amended Complaint because Wood failed to state a claim upon which relief can be granted pursuant to Fed. R. Civ. P. 12(b)(6), and failed to plead fraud with particularity as is required by Fed. R. Civ. P. 9(b). The District Court ruled the First Amended Complaint was too general and conclusory to meet the Rule 12(b)(6) or Rule 9(b) pleading standards. The District Court further refused to allow Wood to amend her First Amended Complaint on grounds of futility.

On July 16, 2009, the United States Court of Appeals for the Second Circuit ("the Second Circuit") affirmed the District Court's decision by Amended Summary Order. The Second Circuit ruled that the First Amended Complaint did not meet the pleading standard required by Fed. R. Civ. P. 9(b). The Second Circuit also affirmed the District Court's refusal to allow Wood to amend her complaint. The Second Circuit reasoned that Wood did not explain what particularity she would add to a second amended complaint. The Second Circuit also ruled

that the District Court did not abuse its discretion by concluding that amending Wood's First Amended Complaint would be futile. In affirming dismissal on these grounds, the Second Circuit did not reach the issue of subject matter jurisdiction.

REASONS FOR DENIAL OF THE WRIT

I. The Plaintiffs Claims Are Unaffected by the Changes to the FCA

Wood asserts that the retroactive changes to the FCA by the enactment of the Fraud Enforcement and Recovery Act ("FERA") authorize her to amend her First Amended Complaint. Specifically, Wood argues that complaints in all FCA cases pending as of June 7, 2008 should be amended to comport with the language in FERA. However, the FCA amendments are unrelated to Wood's claims, and Wood's claims are not entitled to mandatory amendment.

Congress enacted the FERA amendments in direct response to this Court's decision in *Allison Engine Co. v. United States ex. Rel. Sanders*, 128 S. Ct. 2123, 170 L.Ed.2d 1030 (2008). Prior to FERA, an FCA cause of action existed whenever a person "knowingly ma[de], use[d], or cause[d] to be made or used, a false record or statement *to get* a false or fraudulent claim paid or approved by the Government." 31 U.S.C. § 3279(a)(2) (emphasis added). As a result, this Court concluded that a claim failed as a matter of law if a government contractor used government money to pay a third-party subcontractor's false or fraudulent claim. Instead, this Court rea-

soned, in order for a subcontractor defendant to be found liable under the FCA, the false or fraudulent statement had to have been made in order to get the false claim paid or approved *by the government*. In other words, the subcontractor had to intend that the government pay the false claim directly, not the contractor paying the false claim with government funds. As a result, Congress amended the FCA and enacted FERA which removed the words "to get" from the language of the FCA upon which this Court relied in *Allison Engine*. Pursuant to this new standard, a party may be liable if it "[k]nowingly makes, uses or causes to be made or used a false record or statement material to a false or fraudulent claim." 31 U.S.C. § 3729(a)(1)(B). Congress enacted this change in order to avoid granting immunity to a party who defrauded the government but was not in direct privity with the government. *See* 111 H. Rpt. 97.

The narrow circumstance present in *Allison Engine* that led to the amendment of the FCA is not present in the instant case. Neither the District Court nor the Second Circuit decided this case based on the fact that any of the defendants were not in direct privity with the government. The FERA amendments to the FCA do not change either court's analysis of this case. The findings of those courts should not be disturbed.

Nothing in the FERA amendments to the FCA modifies the requirement that a party must plead its cause of action with particularity pursuant to Fed. R. Civ. P. 9(b). The Rule provides that "[i]n all averments of fraud or mistake, the circumstances consti-

tuting fraud or mistake shall be stated with particularity." Fed. R. Civ. P. 9(b). Thus, to meet the requirements of Rule 9(b), a complaint must "(1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent." *Mills v. Polar Molecular Corp.*, 12 F.3d 1170, 1175 (2d Cir. 1993). In short, a plaintiff must "set forth the who, what, when, where and how of the alleged fraud." *United States ex rel. Sarafoglou v. Weill Med. College*, 451 F. Supp.2d 613, 621 (S.D.N.Y. 2006). These requirements promote the three purposes of Rule 9(b), "namely: (1) ensuring that defendants have sufficient notice of plaintiff's claims; (2) discouraging strike suits; and (3) preventing the filing of suits that simply hope to uncover the basis for some previously unspecified wrongdoing." *Id.*

Wood fails to link the defendants' allegedly fraudulent practices to the submission of even a single fraudulent claim even using the modified language from FERA. The Second Circuit correctly examined this issue by asserting that the "Amended Complaint makes no mention of any financial obligation that the Contractor Defendants owed to the government, and moreover, does not specifically reference any false records or statements used to decrease such an obligation." Pet. App. 8a-9a. Wood's theory of FCA fraud is based solely upon conjecture, surmise, and innuendo. Even if Wood were to be afforded the opportunity to amend her pleadings to conform with what she calls the more lenient pleading requirements of FERA, her allegations of fraudulent billing remain conclusory assumptions and are

devoid of the type of detail and specificity that a *qui tam* relator is required to allege to satisfy the requirements of Rule 9(b).

The recent amendment to the FCA does not change the fact that Wood failed to allege a single example of, much less the details of, a fraudulent claim. She has not, and will not be able to, identify a specific amount of charges that were submitted by a particular defendant, provide the date when a false claim was submitted, or provide a copy of a single invoice or bill that was paid. The Second Circuit correctly concluded, "the Amended Complaint fails to specify the time, place, speaker, and even the content of the alleged misrepresentations. In short, it lacks the particulars required by Rule 9(b)." Pet. App. 9a (quoting *Luce v. Edelstein*, 802 F.2d 49, 54 (2d Cir. 1986)).

Furthermore, Wood should not be permitted to plead generally at the outset and then fill in the gaps of her claims through discovery. "One of the purposes of Rule 9(b) is to discourage the filing of complaints as a pretext for discovery of unknown wrongs." *Madonna v. U.S.*, 878 F.2d 62, 66 (2d Cir. 1989). *See also Decker v. Massey-Ferguson, Ltd.*, 681 F.2d 111, 116 (2d Cir. 1982) ("Rule 9(b) [fails] in its purpose if conclusory generalizations ... permit a plaintiff to set off on a long and expensive discovery process in the hope of uncovering some sort of wrongdoing..."). Wood's Amended Complaint does not provide the type of detail Rule 9(b) requires. Wood has provided no basis on which this Court should conclude that allowing her to amend her

pleadings a second time would produce a complaint that is any more specific.

II. Allowing Wood to Amend her Complaint Would Be Futile

Even if this Court allowed Wood to amend her complaint a second time, her theory of liability is implausible and would not survive a Fed. R. Civ. P. 12(b)(6) motion to dismiss. In order to survive a Rule 12(b)(6) motion to dismiss, the factual allegations "must create the possibility for a right to relief that is more than speculative." *Spool v. World Child Int'l Adoption Agency*, 520 F.3d 178, 183 (2d Cir. 2008). Wood's allegations are no more than speculative and do not demonstrate a right to relief. As a result, this Court should deny Wood's petition for writ of certiorari because any amendment to her Amended Complaint would be futile. *Acito v. IMCERA Group, Inc.*, 47 F.3d 47, 55 (2d Cir. 1995).

The plaintiff's entire cause of action is based on her unfathomable theory that the WTC was destroyed by the United States military's DEWs rather than the impact from two high speed jetliners. Pursuant to Wood's theory, defendants were not entitled to payment relating to services rendered to NIST because NIST did not reach the same conclusion as she. As the District Court correctly analyzed, in order for Wood to state a claim pursuant to the FCA, she must sufficiently allege the defendants knowingly presented a false or fraudulent claim, knowingly made or used a false record or statement to get a fraudulent claim paid, or knowingly made or used a

false record or statement to decrease their obligation to pay the Government. Pet. App. 31a. Even if Wood's far fetched allegations were true, this does not "give rise to a reasonable inference that defendants are not entitled to any compensation from the Government for the services they provided." Pet. App. 31a-32a. Wood bases her FCA claim on the unfounded allegation that the defendants are not entitled to compensation because the services that they rendered were "useless", and would only be entitled to compensation if they reached the same conclusions as she – namely that DEWs caused the destruction of the WTC. The District Court correctly stated that seeking payment for services rendered to NIST is not unlawful simply because Wood disagrees with the conclusion of NIST's investigative findings. "[P]urported errors based on flawed reasoning, mathematic calculations, or scientific judgments are not false for the purpose of the FCA." Pet. App. 32a. Even if this Court allowed Wood to amend her complaint a second time to comply with the new parameters of FERA, she still would not state a claim for which relief can be granted. As a result, her petition for writ of certiorari should be denied.

III. Wood Did Not Base Her Appeal on the Modified Provisions of the FCA

FERA provides for the retroactive application of only one section of amendments to the FCA. Specifically, Congress retroactively modified 31 U.S.C. § 3279(a)(1)(B) formerly § 3729(a)(2) ("Section 3729 (a)(2)"). Wood did not base her Second Circuit appeal on the application of Section 3729(a)(2).

In her Second Circuit brief, Wood raised three bases for appeal:

> I. Does the submission of a Request for Correction (RFC) to the National Institute of Standards and Technology (NIST) by Dr. Judy Wood challenging as fraudulent a document prepared by NIST purporting to demonstrate "why and how the Twin Towers were destroyed" but which resulted in an admission by NIST that it "did not investigate the actual collapse" of the Towers overcome the public disclosure bar of under [*sic*] 31 U.S.C. § 3730(e)(4)(A) (because she disclosed the information) or constitute "original source" information for *qui tam* relator purposes per 31 U.S.C. § 3730(e)(4)(B); and under the edict of *Rockwell v. U.S.*, 549 U.S. 457, 127 S. Ct. 1397 (2007)?
>
> II. Does the submission of payment claims for professional services rendered in connection with NIST's [*sic*] preparation of NCSTAR I which is shown by Dr. Wood, the *qui tam* relator, to have been purposefully fraudulent in not fulfilling the mandated objective constitute a false or fraudulent claim by the appellees under the False Claims Act, 31 U.S.C. § 3279(a)(1)?
>
> III. Did the lower court err by not mentioning or considering the actual informa-

> tion upon which Dr. Wood's status as a *qui tam* relator such that, at a minimum remand for further proceedings in the court below is required?

Wood's Opening Brief to the Second Circuit Court of Appeals, Statement of Issues Presented, p. 2. Because Wood did not raise the application of Section 3279(a)(2) in her appellate brief, that issue is deemed waived in subsequent proceedings. *See Zhang v. Gonzales*, 426 F.3d 540, 545 n.7 (2d Cir. 2005).

Wood's challenge to Section 3279(a)(2) is equally moot because it was not germane to the decisions of the District Court or the Second Circuit. Neither court premised its decision on an interpretation of Section 3279(a)(2) and neither court made any mention of this section in its decision. The Second Circuit specifically considered the changes as outlined in FERA and stated that "[w]hile some of these changes [to the FCA] are retroactive, they do not change the analysis herein." Pet. App. 8a at n.2. The Second Circuit acknowledged changes to the FCA, considered those changes, and correctly concluded that they did not affect Wood's claims.

Because Wood's argument that changes to the FCA affected her claims is a red herring and had no bearing on the dismissal of Wood's First Amended Complaint, this Court should deny Wood's petition for writ of certiorari.

CONCLUSION

For all of the above reasons, this Court should deny Judy Wood's Petition for a Writ of Certiorari.

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No. 09-548

IN THE

Supreme Court of the United States

JUDY WOOD on behalf of the United States of America,

Petitioner,

v.

APPLIED RESEARCH ASSOCIATES, INC.; SCIENCE APPLICATIONS INTERNATIONAL CORP.; COMPUTER AIDED ENGINEERING ASSOCIATES, INC.; DATASOURCE, INC.; GEOSTATS, INC.; GILSANZ MURRAY STEFICEK, LLP; HUGHES ASSOCIATES, INC.; AJMAI ABASSI; EDUARDO KAUSEL; DAVID PARKS; DAVID SHARP; DANIELE VENEZANO; JOSEPH VAN DYCK; KASPAR WILLIAM; ROLF JENSEN & ASSOCIATES, INC.; ROSENWASSER/GROSSMAN CONSULTING ENGINEERS, P.C.; SIMPSON GUMPERTZ & HEGER, INC.; S.K. GHOSH ASSOCIATES, INC.; SKIDMORE OWINGS & MERRILL, LLP; TENG & ASSOCIATES, INC.; UNDERWRITERS LABORATORIES, INC.; WISS, JANNEY, ELSTNER ASSOCIATES, INC.; AND UNITED AIRLINES,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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QUESTION PRESENTED

Whether Petitioner, who predicated her False Claims Act Complaint on her theory that the tragedy of 9/11 was an elaborate hoax, is entitled to amend her Complaint, which was properly dismissed for failure to plead fraud in accordance with Fed. R. Civ. P. 9(b), based on irrelevant amendments to the False Claims Act.

CORPORATE DISCLOSURE STATEMENT

Respondent Applied Research Associates, Inc. has no parent corporation and no publicly held corporation holds 10% or more of its stock.

Respondent Gilsanz Murray Steficek, LLP has no parent corporation and no publicly held corporation holds 10% or more of its stock.

Respondent Hughes Associates, Inc. has no parent corporation and no publicly held corporation holds 10% or more of its stock.

Respondent Rolf Jensen & Associates, Inc. has no parent corporation and no publicly held corporation holds 10% or more of its stock.

Respondent Science Applications International Corporation is a wholly-owned subsidiary of SAIC, Inc., whose stock is publicly-traded on the New York Stock Exchange under the symbol, "SAI."

Respondent Skidmore Owings & Merrill LLP has no parent corporation and no publicly held corporation holds 10% or more of its stock.

Respondent Teng & Associates, Inc. has no parent corporation and no publicly held corporation holds 10% or more of its stock.

Respondent Underwriters Laboratories, Inc. has no parent corporation and no publicly held corporation holds 10% or more of its stock.

Respondent Wiss, Janney, Elstner Associates, Inc. has no parent corporation and no publicly held corporation holds 10% or more of its stock.

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IN THE

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v.

APPLIED RESEARCH ASSOCIATES, INC.; SCIENCE APPLICATIONS INTERNATIONAL CORP.; COMPUTER AIDED ENGINEERING ASSOCIATES, INC.; DATASOURCE, INC.; GEOSTATS, INC.; GILSANZ MURRAY STEFICEK, LLP; HUGHES ASSOCIATES, INC.; AJMAI ABASSI; EDUARDO KAUSEL; DAVID PARKS; DAVID SHARP; DANIELE VENEZANO; JOSEPH VAN DYCK; KASPAR WILLIAM; ROLF JENSEN & ASSOCIATES, INC.; ROSENWASSER/GROSSMAN CONSULTING ENGINEERS, P.C.; SIMPSON GUMPERTZ & HEGER, INC.; S.K. GHOSH ASSOCIATES, INC.; SKIDMORE OWINGS & MERRILL, LLP; TENG & ASSOCIATES, INC.; UNDERWRITERS LABORATORIES, INC.; WISS, JANNEY, ELSTNER ASSOCIATES, INC.; AND UNITED AIRLINES,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioner filed a *qui tam* Complaint under the False Claims Act, 31 U.S.C. §§ 3729-3733 ("FCA") premised on her belief that the events of September

11, 2001 were an elaborate hoax and that, eyewitnesses and video records notwithstanding, no airplanes hit the World Trade Center ("WTC") on that date. Instead, Petitioner's theory underlying her Complaint is that Directed Energy Weapons ("DEWs") in the possession of the United States military destroyed the WTC. Specifically, in her Complaint Petitioner challenged the investigative findings published in a report by the National Institute of Standards and Technology ("NIST"), which Respondents assisted in preparing, as to how and why the WTC buildings collapsed after the 9/11 terrorist attacks. In her Complaint, Petitioner claimed that all of the Respondents participated in fraud by maintaining to NIST that the impact of airplanes caused the collapse of the WTC when they allegedly knew, or should have known, that the collapse was in fact caused by DEWs.

The district court granted Defendants' Motions to Dismiss and dismissed Petitioner's First Amended Complaint because, *inter alia*, Petitioner failed to state a claim upon which relief could be granted pursuant to Fed. R. Civ. P. 12(b)(6), and failed to plead fraud with particularity as required by Fed. R. Civ. P. 9(b). Pet. App. 18a-39a. The district court refused to allow Petitioner to further amend her Complaint on the grounds that such an exercise would be futile. *Id.*

On July 16, 2009, the United States Court of Appeals for the Second Circuit affirmed the district court's decision by Amended Summary Order. Pet. App. 1a-17a. The Second Circuit ruled that Petitioner's Complaint did not meet the heightened pleading standard required by Fed. R. Civ. P 9(b) and that the district court correctly concluded that

granting Petitioner leave to amend her Complaint would be futile. *Id.*

REASONS FOR DENYING THE PETITION

I. THE SECOND CIRCUIT AFFIRMED DISMISSAL OF PETITIONER'S COMPLAINT BASED ON HER FAILURE TO SATISFY THE PLEADING REQUIREMENTS OF FED. R. CIV. P. 9(b)

Although Petitioner attempts to rely upon the recently passed Fraud Enforcement and Recovery Act, Pub. L. No. 111-21, 123 Stat. 1621 (2009) ("FERA"), to justify further amendment of her Complaint, FERA is irrelevant because the Second Circuit dismissed her Complaint for failure to meet the heightened pleading requirements of Fed. R. Civ. P. 9(b) ("Rule 9(b)"); FERA has no bearing on the proper interpretation and application of Rule 9(b).

Any review on a writ of certiorari by this Court is a matter of judicial discretion, not a matter of right and a petition for a writ of certiorari will only be granted for compelling reasons. Sup. Ct. R. 10. In this case, granting review is unnecessary because there is no split among the Circuit Courts as to the heightened pleading requirements provided for in Rule 9(b), and the application of Rule 9(b) to the peculiar facts of this case is certainly not a critical question of law that justifies granting Petitioner's request for certiorari. Moreover, even assuming *arguendo* Petitioner was correct that the relevant issue for consideration is the proper interpretation of FERA, there is no split among the Circuit Courts on that issue either.

It is well-established that because the essence of an FCA case is fraud, Rule 9(b) applies to FCA cases.

See, e.g., United States ex rel. Karvelas v. Melrose-Wakefield Hosp., 360 F.3d 220, 227-228 (1st Cir. 2004); *Gold v. Morrison-Knudson Co.*, 68 F.3d 1475, 1476-1477 (2d Cir. 1995) (rejecting the argument that Rule 9(b) does not apply to FCA cases); *United States ex rel. Kinney v. Stoltz*, 327 F.3d 671, 674-675 (8th Cir. 2003) (noting the overwhelming weight of authority holding that Rule 9(b) requires that "all averments of fraud shall be stated with particularity."). Petitioner herself does not dispute that Rule 9(b) is applicable to her Complaint.

Rule 9(b) provides that "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." To satisfy the pleading requirements of Rule 9(b), a Complaint must "(1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent." *See Shields v. Citytrust Bancorp, Inc.*, 25 F.3d 1124, 1128 (2d Cir. 1994). "One of the [further] purposes of Rule 9(b) is to discourage the filing of Complaints as a pretext for discovery of unknown wrongs. [A plaintiff's] contention, that discovery will unearth information tending to prove his contention of fraud, is precisely what Rule 9(b) attempts to discourage." *See Madonna v. United States*, 878 F.2d 62, 66 (2d Cir. 1989) (internal citation and quotation marks omitted). In short, an FCA *qui tam* plaintiff must "set forth the who, what, when, where and how of the alleged fraud." *United States ex rel. Sarafoglou v. Weill Med. College*, 451 F.Supp.2d 613, 623 (S.D.N.Y. 2006).

Petitioner's lengthy Complaint purported to describe an immensely large and complex conspiracy

undertaken by 27 co-conspirators (and the United States Government). Yet, Petitioner failed to allege a single detail regarding any Respondent's supposed role in this alleged conspiracy or to identify a single false claim made in furtherance of this supposed conspiracy. Nowhere did Petitioner allege an act of fraud by a specific Respondent, notwithstanding the fact that Rule 9(b) requires *qui tam* plaintiffs to "connect the allegations of fraud to each individual defendant." *Center Cadillac, Inc. v. Bank Leumi Trust Co. of New York*, 808 F.Supp. 213, 230 (S.D.N.Y. 1992) (citing *Luce v. Edelstein*, 802 F.2d 49, 54 (2d Cir. 1986); *Landy v. Mitchell Petroleum Tech. Corp.*, 734 F.Supp. 608, 620 (S.D.N.Y. 1990) ("Where multiple defendants are asked to respond to allegations of fraud, the complaint shall inform each defendant of the nature of his alleged participation in the fraud."). Petitioner's Complaint impermissibly relied on "sweeping references to acts by all or some of the defendants" without apprising the individual Defendants of the exact accusations against them. *Center Cadillac*, 808 F.Supp. at 230. Moreover, Petitioner's Complaint failed to provide a single employee's name, identify a specific claim, request for payment or date, the content of any discussions or communications, or provide any other particulars indicative of a conspiracy.

When the district court analyzed Petitioner's Complaint, it correctly found that she failed to satisfy the pleading requirements of Rule 9(b), noting:

> Plaintiffs vaguely allege that, for a number of years, all Defendants wrongfully sought payment for services performed in bad faith. They do not cite a single identifiable record or billing submission that they claim to be false, or give a single

> example of when a purportedly false claim was presented for payment by a particular defendant at a specific time.

Pet. App. 34a-35a. Similarly, the Second Circuit correctly noted that Petitioner's Complaint briefly described each of the Respondents in sweeping generalizations, but did not contain any specific allegations as to any given Respondent's involvement in the allegedly fraudulent conduct. *Id.*

The Second Circuit further reasoned:

> [w]hile Wood may genuinely believe that the analysis and information provided by the Contractor Defendants is incorrect, that assertion—even accompanied by supporting evidence for Wood's own theory—does not warrant an inference that the services provided by the Contractor Defendants, and claims for payment submitted therewith, were fraudulent. We agree with the district court that the proposition that "NIST ultimately failed to conclude, consistent with [Petitioner's] hypothesis, that the Twin Towers was destroyed by the military's directed energy weapons," *Wood*, 2008 WL 2566728, at *4, falls short of the "ample factual basis [needed] to support [Petitioner's] charges." *See O'Brien v. Nat'l Prop. Analysts Partners*, 936 F.2d 674, 676 (2d Cir. 1991).

Pet. App. 13(a). The Second Circuit recognized "the Amended Complaint fails 'to specify the time, place, speaker, and even the content of the alleged misrepresentations'" and, therefore, "it 'lacks the 'particulars' required by Rule 9(b).'" Pet. App. 9a (citing *Luce*, 802 at 54). Thus, the district court and the Second Circuit correctly concluded that Petitioner's

failure to allege details supporting a connection between any Respondent and the alleged fraudulent statements in NIST's report violated Rule 9(b) and required dismissal of her Complaint.

There is no basis to disturb the Second Circuit's ruling and grant the petition, especially as Petitioner's outlandish and offensive Complaint falls woefully short of the undisputed pleading standards. Therefore, Petitioner's petition for a writ of certiorari should be denied.

II. THE SECOND CIRCUIT CORRECTLY HELD THAT PETITIONER'S APPEAL DID NOT INVOLVE THE SECTION OF THE FCA MODIFIED BY FERA

Even if the Second Circuit had dismissed Petitioner's Complaint based on its interpretation of the FCA, the enactment of FERA resulted in the retroactive application of only one section of amendments to the FCA, a section that was not at issue in Petitioner's appeal and has no effect on the requirement to plead an FCA violation with particularity. Specifically, pursuant to § 4(f)(b) of FERA, the only retroactive application of FERA applies to 31 U.S.C. § 3729(a)(1)(B), formerly § 3729(a)(2). Prior to the FERA amendments, any person who "knowingly makes, uses or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government" was liable under 31 U.S.C. § 3729(a)(2). This section of the FCA was amended retroactively by FERA to provide that any person who "knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim" is liable. 31 U.S.C. § 3729(a)(1)(B). Thus, FERA amended the FCA to

make a subcontractor's intent irrelevant in an FCA case as long as its false statement was material to a Government decision to pay. This change does not provide grounds to allow Petitioner to amend her Complaint as her Complaint is devoid of any allegations regarding subcontractor requests for payment and she never raised § 3729(a)(2) as an issue in her appeal to the Second Circuit.

In addition, in dismissing Petitioner's Complaint, the district court never even attempted to interpret § 3729(a)(2). Moreover, in Petitioner's Second Circuit Brief, she raised three issues for consideration none of which involved the proper interpretation of § 3729(a)(2).

Petitioner first raised her FERA-based arguments in a Motion for Enlargement of Time for Oral Argument, which the Second Circuit denied. Petitioner again raised her argument that FERA somehow justified allowing her to amend her Complaint during oral argument in the Second Circuit. In its Order, the Second Circuit directly addressed Petitioner's FERA-based arguments and dismissed them succinctly, noting:

> In 2009, after Wood's Complaint was filed, the various causes of action in 31 U.S.C. § 3729 were reorganized and restated. *See* Fraud Enforcement and Recovery Act, Pub. L. No. 111-21, 123 Stat. 1621 (2009). *While some of these changes are retroactive, they do not change the analysis herein.*

Pet. App. 8a, n.2 (emphasis added). The Second Circuit, therefore, acknowledged FERA's modifications of the FCA, considered those modifications,

and correctly concluded that they did not affect Petitioner's claims.

As neither the district court's decision nor the Second Circuit's Order was in any way premised on an interpretation of § 3729(a)(2), and Petitioner herself failed to raise the interpretation of § 3729(a)(2) in her appeal to the Second Circuit, the enactment of FERA is entirely irrelevant to the issues addressed by the Second Circuit. Because Petitioner's argument that the FERA changes to the FCA somehow reach her Complaint is wrong, and was properly evaluated and rejected by the Second Circuit, this Court should deny Petitioner's petition for writ of certiorari.

III. EVEN IF THE RETROACTIVE FCA AMENDMENT WERE RELEVANT TO PETITIONER'S ALLEGATIONS, THERE WAS NO "PENDING CLAIM" TO WHICH THE RETROACTIVITY WOULD ATTACH

As noted above, FERA includes a retroactivity clause which provides that "subparagraph (B) of § 3729(a)(1) of title 31, United States Code, as amended by subsection (a)(1), shall take effect as if enacted on June 7, 2008, and apply to all claims under the False Claims Act (31 U.S.C. § 3729 *et seq.*) that are pending on or after that date." Pub. L. No. 111-21, § 4(f), 123 Stat. 1625 (2009). In her petition, Petitioner argues that the "pending claims" language applies to all FCA cases pending as of June 7, 2008 and the enactment of FERA should result in the automatic right to amend all such Complaints.

However, the only Courts to address this issue arrived at the opposite conclusion. On remand, the district court in *United States ex rel. Sanders v. Alli-*

son Engine Co., Inc., considered "whether Congress intended the retroactivity language to apply to 'cases' pending on June 7, 2009 [sic.], or to 'claims' pending on June 7, 2009 [sic.]." *United States ex rel. Sanders v. Allison Engine Co., Inc.*, No 1:95-cv-970, 2009 WL 3626773, at *3 (S.D. Ohio, Oct. 27, 2009). That district court held that:

> A "claim" is defined in the amendments to the FCA set forth in the FERA as "any request or demand, whether under a contract or otherwise, for money or property and whether or not the United States has title to the money or property . . . " 31 U.S.C. § 3729(b)(2)(A). Neither the amendments to the FCA set forth in the FERA nor the prior FCA include a definition of "case." Thus, a plain reading of the retroactivity language reveals that the relevant change is applicable to "claims" and not to "cases." The new FCA retroactivity clause is not applicable to the Defendants in this case.

Id. at *4; *see also United States v. Science Applications Int'l Corp.*, No. 04-1543, 2009 WL 2929250, at *14 (D.D.C. Sept. 14, 2009) (evaluating the retroactivity and concluding that "[t]here is no reason to depart from the usual rule and section 4(f)(1) will be interpreted to apply to 'claims' as defined in § 3729, that is, requests or demands for money or property. Thus, FERA has no impact on the present action.").

In this case, the evidence is undisputed that none of the claims for payment that could possibly be at issue in Petitioner's Complaint were pending claims for payment as of June 7, 2008; each such claim had been submitted and disposed of long before that date. Accordingly, the retroactive "claims" language in FERA is wholly inapplicable to the instant case and

does not provide a reason for granting Petitioner's writ of certiorari.

CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari should be denied.

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